1322 No. 3906 1322

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AKTIESELSKAPET BONHEUR (a corporation)
Appellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY (a corporation), claimant of the American Steamer "Beaver", her tackle, apparel, engines, boilers, furniture, etc.,
Appellee.

BRIEF FOR APPELLANT.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Appellant.

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BRIEF FOR APPELLANT.

This is an action by the owners of the motorship "Bayard" against the American steamship "Beaver" for damages for collision in the Bay of San Francisco.

Liability for the collision is admitted by the respondent, and the principal controversy arises upon the question of the amount of demurrage to be paid to said vessel for the loss of time during which she was undergoing repairs.

The vessel at the time was

> "offered a lump sum of $400,000 as charter hire * * * for a voyage to the Orient and return,

and it is on this offer that libelant bases its claim for the amount of damage sought as demurrage." (Opinion D. C., Rec. 304.)

The District Court, however, refused to allow any demurrage, and the reason given therefor is best stated in the opinion of the court as follows:

> "But it is quite clear that a charter at that rate *would not have been approved by the Shipping Board,* which had fixed a basic rate of 45 s. per deadweight ton per month. While the 'Bayard' was laid up for repairs *the 'Brazil'* was also idle in port, although there was a great demand for ships and she could have sailed at any time at the rates fixed by the Board. The fact that she did not do so leads me to the belief that the owners were unwilling to accept those rates, and preferred to wait in the hope or expectation of securing a more profitable figure. They were in fact unwilling to accede to the regulations of the Shipping Board with regard to rates, and seemingly desired to take their chances of getting higher rates later by leaving the ship idle during this period. *If it were not* for the voluntary idleness of *the 'Brazil'* I would allow demurrage to the 'Bayard' at the rate of forty-five shillings per deadweight ton per month for the period of thirty-four days. But as the owners preferred to leave the *'Brazil'* idle when she could have been chartered at those rates it is reasonable to conclude that they would not have accepted them for the 'Bayard' had she been in commission. A higher rate would not have been approved by the Board." (Rec. pp. 304-305.)

This presents two questions for consideration on this appeal:

1. *Is the court warranted under the law applicable to such cases in finding that a higher rate than 45 shill-*

ings per deadweight ton per month "would not have been approved by the board"?

2. *Is the court warranted in holding that because the managing owners of the "Brazil" (who were also the managing owners of the "Bayard") had allowed the "Brazil" to remain idle, that the owners of the "Bayard" were not entitled to recover?*

It is our contention that under the rules of law for determining the question of demurrage in collision cases, the District Court was not warranted in either of the conclusions arrived at, and that the "Bayard" should, under the facts of this case, have been allowed demurrage upon the basis of her proposed charter of $400,000.

The following well settled principles are controlling in the consideration of the facts of this cause:

1. Where the evidence of the loss is the best that the case affords, *justice requires all doubts to be resolved against the party in fault,* even though thereby libelant derives a greater benefit than mere indemnity.

2. The law implies consequential loss, and hence the *burden of proof that the Shipping Board would not have approved* a charter for a lump sum of $400,000 *is on respondent, and must be* clearly established.

I.

The Rule of Damages.

The rule governing in this case is laid down by the Supreme Court in the case of *Williamson v. Barrett,* 13 How. *111,* 112.

This, we think, is the leading case upon the subject, and the principle there announced, so far as we are advised, has never since been abandoned. It is to the effect that

1. *The damages for detention are to be determined by the* MARKET VALUE *of the use of the vessel during the period of her detention. This* REGARDLESS *of the fact whether at the time of the collision she was, or was not, under charter.*

If she were in fact under charter, her charter would tend to prove that market value. If she were not then under charter, then the demand in the market for vessels of that description and the price which the owner could or MIGHT *have obtained for her hire, is the measure of compensation.*

Inasmuch as vessels are not necessarily employed under charter, but are quite as often employed by the owner in freighting for others, we supplement the above proposition with the further proposition that

If it can be shown that there is a demand for freightage by vessels placed on the berth by the owner during the time of the detention, then the amount that the vessel could have earned by being placed in the berth, is also a measure of damage for such detention.

In other words, using the language of the Supreme Court in the case above cited, though somewhat disassociated from the context, the rule in its simplest form is to

> "look to the demand in the market for vessels of the description that has been disabled, and to the

price there, which the owner could obtain or *might have obtained* for her hire as the measure of compensation."

We do not understand the respondents to controvert this rule, but they claim no employment could have been obtained for this vessel, because of the alleged interference of the Government, and that therefore there is no loss.

To this question we shall address ourselves when we come to consider the evidence in this case.

The part of the decision in *Williamson v. Barrett* to which we wish to call attention in this connection, is as follows:

After referring to the rule laid down by Dr. Lushington in the case of "The Gazelle", which was a case in which the ship *was engaged in earning freight* at the time of the collision, and she therefore was allowed the gross freight she would then have earned, deducting so much as would in ordinary cases be disbursed on account of the ship's expenses in earning it, the Supreme Court said:

> "It is true, in that case, the ship was engaged in earning freight at the time of the collision; and the loss, therefore, more fixed and certain than *in the case where she is* NOT AT THE TIME UNDER CHARTER-PARTY, *and where her earnings must in some measure depend upon the contingency of obtaining for her employment. If, however, we look to the demand in the market for vessels of the description that has been disabled, and to the price there, which the owner could obtain or* MIGHT *have obtained* for her hire as the measure of compensation, all this uncertainty disappears. If there is no de-

> mand for the employment, and of course, no hire to be obtained, no compensation for the detention during the repairs will be allowed, and no loss would be sustained.
>
> But, if it can be shown that the vessel *might have been chartered* during the period of the repairs, it is impossible to deny that the owner has not lost, in consequence of the damage, the amount which she might have thus earned.
>
> The *market price,* therefore, of the hire of the vessel applied as a test of the value of the service, will be, if not as certain as in the case where she is under a charter-party, at least, so certain that, for all *practical purposes in the administration of justice,* no substantial distinction can be made. It can be ascertained as readily and with as much precision as the price of any given commodity in the market; and affords as clear a rule for estimating the damages sustained on account of the loss of her service, as exists in the case of damage to any other description of personal property, of which the party has been deprived."

We think the foregoing is broad enough to cover every phase of the present case, whether we turn to the question as to whether or no the vessel *might* have been *chartered,* or whether or no the vessel *might* have been *placed in the berth* for hire. In either event it comes under the language of the decision,

> "If, however, we look to the demand in the market for vessels of the description that has been disabled, and to the price there, which the owner could obtain, or *might have obtained* for her hire, as the measure of compensation,"

or extend somewhat the language of the court in the next paragraph,

> "If it can be shown that the vessel *might* have been chartered during the period of the repairs"

> [or might have been laid on the berth for the owner at profitable rates] "it is impossible to deny that the owner has not lost, in consequence of the damage, the amount which he might have thus earned."

Having before us the rule under which the damages are to be assessed, we have the next proposition, and the all-important one in the consideration of the present case,

2. What is the nature of the evidence required to establish these damages?

Upon this subject the law seems equally well settled. The rule is that

> **"Where the evidence is the best the case affords, strict justice requires that the doubts be resolved against the party in fault. If the libelant derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden which the law will not place on him."**

This rule is *well settled,* and plays an important part in this case. It is because the lower court reversed the application of this rule, and resolved the doubts in favor, rather than against, the party in fault, that we think he has fallen into error.

In the case of *The Mason,* 249 Fed. *720,* it is said:

> "It is assuredly a settled general rule, though oftenest applied in collision, that a fault in one party, once firmly established, casts upon that party the burden of showing any contributing fault committed by his opponent. *The Persian,* 224 Fed. 441, 140 C. C. A. 135. The analogue of this rule is applicable to matters of damage, wherefore as

> was stated in *The Mayflower,* 1 Brown's Adm. 376, Fed. Cas. No. 9345, affirmed as *The Dove,* 91 U. S. 381, 23 L. Ed. 354, the party in fault upon the merits of the case *must bear whatever inconvenience or hardship there may be in proving the exact amount of damages sustained;* and, if the party not in fault 'derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden which the law will not place upon him'."

See, also *The Margaret J. Sandford,* 37 Fed. 152.

The Mayflower, 1 Brown's Adm. 376, Fed. Cas. No. 9345 (Mich. 1872), referred to by the court in *The Mason* above, is an important case reviewing the whole question of damages for demurrage in collision cases. It went to the Supreme Court under title of *The Dove,* 91 U. S. 381, in which court, however, the question of damages does not seem to have been discussed. The case, however, is cited with approval by the Supreme Court as late as 166 U. S. 127-421, as well as by the Circuit Court of Appeals in the 249th Fed. 720, above. We may, therefore, safely rely upon it as of the highest authority.

In that case the vessel was sunk, raised, and repaired.

Before the collision she was employed by the libelant as one of a line of steamers carrying passengers and freight, and making daily trips from Detroit to Port Huron and back.

The respondents contended that the proper basis or measurement of damages for the delay, was the rental or charter value alone, and because it appeared that there was *no established rental* or charter value of such

a vessel, and further *does not appear that she could have been chartered* during the time of her detention, there was no basis for recovery of damages as demurrage.

The libelants contended, that there was no established rental or charter value, and because the libelants did not keep the vessel for hire, but for their own use in the business in which she was intended, and was then engaged, the value of such use to libelants in that particular business, is the proper basis and measure of such damages.

The respondent replied, that the proof of such value is based on probable profits of such service during the detention, and that such proof is excluded by express authority.

The authority relied upon for this proposition, was

Smith v. Condry, 1 How. 28, and *Williamson v. Barrett,* 13 How. 101.

The court carefully reviewed these cases, and held that neither case sustained the proposition contended for.

In reviewing *Williamson v. Barrett,* the District Court said, of the effect of the evidence submitted in the case for his decision:

> "I am free to admit, however, that the question is not free from difficulty, and some doubt, but *the evidence given being the best the case affords and being reasonably certain, I think strict justice requires that the party in fault should bear whatever inconvenience or hardships there may be arising out of the attendant difficulties and doubts.* Dr.

> Lushington in the case of The Gazelle, 2 W. Rob. Adm. 281, 284, in remarking upon the general question, with great clearness and justice, said: 'The right against a wrong doer is for a *restitutio in integrum,* and this restitution he is bound to make without calling upon the party injured to assist him in any way whatsoever. If the settlement of the indemnification be attended with any difficulty (and in those cases difficulties must and will frequently occur), the party in fault must bear the inconvenience. He has no right to fix this inconvenience upon the injured party; *and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him.'* It is true this was said against a reduction of one-third new for old, as in insurance cases, in determining the amount due for repairs; but at page 284 the learned Doctor expressly applies the same doctrine to demurrage."

If it cannot be proved that profits would have been certainly made, it suffices if the fact is *proved circumstantially* and with a reasonable degree of certainty.

> *The North Star,* 140 Fed. 263, Appeal 151 Fed. 168.

In the last named case, the collision occurred before the expiration of the charter under which she was operating, and while the vessel was on her last trip under said charter. Had the collision not occurred, the vessel would have been able to discharge her cargo under that charter, and could have returned to Duluth, Minn. taking on a cargo of grain, and returned within the period of navigation fixed by the underwriters.

The commissioner rejected a claim for damages for the loss of the use of the steamer and consort during that time, and the libelant excepted to the report. The court said:

> "It will be observed that damages such as are here sought are recoverable only when the loss of profits is proved with reasonable certainty. The commissioner refused to make any allowance for the loss of use during the vessel's delay, *because the evidence did not show that* charters were offered the libelant, * * * *for the specific vessels* detained by the collision. The undisputed evidence, however, shows that the Siemens belonged to a class of vessels for which there was a demand, and that grain cargoes were available to vessels of her class after November 28, 1899; that libelant was offered charters from Duluth to Buffalo at the transportation rate of five cents per bushel; that two charters were accepted for certain of libelant's vessels, and additional charters refused, owing to the condition of the Siemens."

The court then states the law applicable to these facts, and cites cases, among them *Williamson v. Barrett, the Potomac, the Lagonda* and *the Margaret J. Sandford,* and quotes from *Williamson v. Barrett,* the phrase:

> "But if it can be shown that the vessel might have been chartered during the period of the repairs, it is impossible to deny that the owner has not lost in consequence of the damage, the amount which she might have thus earned."

He then applies the principle to the case in the following language:

> "The facts show, not only that opportunity existed for using the Siemens and Holly to carry grain from Duluth to Buffalo, but that in all probability

> freight would have been earned between December 2nd and the actual close of navigation, despite the early approach of the close of the season. Both vessels were prevented by the collision from making another trip during that season."

The court also takes up the proposition of other vessels belonging to the fleet which could have been substituted for this vessel, and says it is unimportant, and gives his reasons for that conclusion, in which connection he cites *The State of California,* 54 Fed. 404 (C. C. A. 9th Cir.), and says:

> "The trend of authorities is to the effect that a tort feasor must suffer whatever damages have been sustained without looking to the injured party for any assistance whatever."

He then quotes from *The Mayflower* the language referred to by us upon the same subject, and proceeds:

> "This doctrine was cited with approval in *The Conqueror,* supra. (U. S. Sup. Ct.)

The case was appealed to the Circuit Court of Appeals, 151 Fed. 168, where the decree was modified upon the *question of fact,* but the law was not questioned.

So also in a case where a charter had been *offered but refused.*

> *The Vanadis,* 250 Fed. 1010 (S. D. of N. Y. Apr. 8, 1918).

This was a claim for demurrage on detention of yacht, on proof of $13,000 a month *having been offered for her for the season* of 1914-15, and that *such vessels were scarce and in demand at the time* and that her charter

value was $11,000, assuming any damage for detention were properly allowable at all.

Collision took place on June 13, 1915, and the detention was during the month of July, 1915.

The period of detention was, roughly speaking, the month of July, 1915, which was *part of the season* in which vessels of her class were used.

In this case *The Conqueror,* 166 U. S. is referred to as establishing a contrary doctrine, and the court said:

> "I must concede that some of the language in that case, broken from its context, lends itself to that conclusion, but the decision involved nothing of the kind. It turned upon the dubiousness of the proof of value of the yacht. * * * I see no reason to think that, if the exchange value of the yacht's use in The Conqueror, supra, had been established in the customary way, the libelant would have had further difficulty in his recovery."

The basis of the decision is that though not intended for commercial hire, but only for use as a means of recreation or pleasure, such means are the subject of purchase and sale, and therefore have money value.

The point, however, that makes the case material to our present inquiry is the fact, that *the owner did not propose or intend to charter her,* but had *evidently refused the offered charter* and was using her for his own pleasure.

The decision recognized that pleasure is of commercial value, such value to be measured by the proof of a market through an offer that was made, *but not accepted.* The offer was for the season of 1914-15, but the detention

took place during July, 1915, at which time she was being used by libelant.

3. So, ALSO, THE LAW IMPLIES CONSEQUENTIAL LOSS.— Presumption of loss is in our favor, **so burden of proof that the shipping board would not allow her to charter, is on respondent, and unless clearly established, his defense fails.**

> "If the owner of a horse, or a mill, or machinery, or a house, is temporarily deprived of his use of the property by the wrongful act of another, *the law implies consequential loss as a necessary and proximate result,* and allows a recovery for the value of its use as a proper item of damages, and permits the value to be shown by the opinion of witnesses conversant with the subject. (Citing cases.) In the large commercial ports the value of the hire of a vessel can as well be ascertained as that of most other kinds of property used for business purposes. As the question is one for the opinion of experts it is very likely to be involved in considerable contradiction of estimates, but this is an objection which applies wherever a question of market value or usable value arises. The injured party is not necessarily confined, in proving his consequential loss, to the amount of the market value of the use of his vessel during the time of detention. Even where the loss arises from breach of contract the rule is that the party injured is entitled to gains prevented, as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach, (Citing cases.) and the rule in torts is *restitutio in integrum.*"
>
> *The Margaret J. Sandford,* 37 Fed. 151-52.

We have, then, the following legal propositions applicable to the facts of this case:

1. *Damages are to be determined by the market value of the use of the vessel.*

This value is to be determined by her charter, if at the time under charter; if not under charter, then the demand in the market for vessels of that description and the price which the owner could or MIGHT *have obtained, is the measure of compensation.*

If it can be shown that there is a demand for vessels placed on the berth, then the amount that the vessel could have earned by being placed on the berth, is also a measure of damage.

2. *The evidence of damage need not be absolutely certain, but only reasonably certain.*

Where the evidence is the best the case affords, strict justice requires that the doubts be resolved against the party in fault. If the libelant derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him.

3. *The law implies consequential loss, and hence the burden of proving that the shipping board would not allow the proposed charter for a lump sum of $400,000 is on respondent. Unless clearly established, his defense fails.*

With this state of the law in view, what is

II.

The Evidence Which Will Determine the Amount of Our Demurrage?

The vessel had just completed a voyage under charter to Mr. Moore, who had also had her for a trip previous

thereto, and who, at the time of the collision, had under submission to the owners an offer for a third trip under a lump sum charter of $400,000, for a voyage to two points in the Philippines and return, the terms of which charter were to be the same as those of the previous charter.

The collision changed the conditions under which the vessel would be available. From that instant she was no longer available for service, and it was indefinite, not only as to when she would again become available, but also as to how she would at the end of that period be available, or under what conditions, or for what voyage—all due to the rapidly changing conditions directly or indirectly due to the war.

For this reason the negotiations were dropped. (Kutter, p. 109.)

However, we deem it immaterial, insofar as fixing her market value is concerned, that the charter was not entered into. Being an offer in good faith in a competitive market, for the use of the vessel by a party in whose employ she had been for a period of about six months just preceding the collision, the offer fixes definitely, and with more than "reasonable certainty," the market value of the use of the vessel at the time of the collision, and in the consideration of this question *the time of the collision,* November 3rd, *is the time when respondent's liability became fixed.* Any changes in conditions subsequent to that time, by reason of which that market became no longer available, are mere elements in the *loss* of *the market* consequent upon the collision. A subsequent fall in the market, or what is tantamount thereto, a *sub-*

sequent refusal of the Shipping Board to approve a charter for the price named, cannot avail the respondent, provided that at that date such approval "could * * * or *might* have (been) obtained." (*Williamson v. Barrett,* ante.)

Neither is it necessary under the authorities above referred to, for libelant to prove with certainty that such approval could have been obtained. In fact he need not prove it at all, because the burden is on respondent to prove that we *could not* have obtained it. And if there be any doubt under the evidence as to whether we could, or could not, that doubt is to be resolved against the respondent.

In the language of the court in *The Mayflower,* where the court admitted that the question before him was not free from difficulty and doubt,

> "But the evidence given being the best the case affords, and being reasonably certain, I think strict justice requires that the party in fault should bear whatever inconvenience or hardships there may be arising out of the attendant difficulties and doubts."
>
> * * * * * * *
>
> "He has no right to fix this inconvenience upon the injured party; and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not impose upon him."

This language is particularly applicable to the evidence offered by the Shipping Board in view, *not only of the inconclusiveness of the testimony actually given,* but

also because of the refusal to permit an inspection of their records to determine for ourselves whether or no it contained pertinent matter, not considered by the witness, for arriving at a correct conclusion. This we contend for irrespective of any "reasons of State" suggested for withholding the evidence. Whether they be "reasons of State" or mere partisanship, it results in the same thing. Speaking for the libelant, the evidenc controverting this special contention is "the best the case affords," and for the difficulty arising out of our inability to get at the evidence, even though due to "reasons of State," the "party at fault" must bear the consequence.

CHARTERING COMMITTEE'S APPROVAL.

Now, let us take up the question with respect to the alleged inability of the vessel to go upon the proposed voyage because, as the court states, the Shipping Board would not approve the charter.

At the hearing we took the position, which we still take, that no testimony of any member of the Committee as to what *he would,* or *would not* have done, with respect to this charter, is material. In fact, *no member* of that committee could say *what the Committee as a body* would, or would not have done, *until the charter had been submitted to them, and a vote taken upon the proposition.*

In this, as we shall presently see, we are absolutely confirmed by the testimony of Mr. Smull.

If we are justified in this statement of the evidence, the defense necessarily falls to the ground, under the rules above set forth. Merely casting a doubt upon the matter will not serve for the defense. Nevertheless, we think it will satisfactorily appear that they have not succeeded even in casting a doubt.

CHARTERING COMMITTEE COULD NOT SAY IT WOULD APPROVE OR DISAPPROVE.

To begin with, Mr. Page, a man of large experience on this coast, testifies, that, so far as his experience is concerned, the Government did not begin to interfere with the chartering of vessels until November 27th, notwithstanding his firm is, and for years has been, one of the largest chartering firms on this coast, and tried to keep in touch with all the business going on in the port. (29.)

He further testifies that there was no particular class of vessels that would, or would not, be approved, and no fixed rule about them. *It depended upon the discretion of the controlling board.* (p. 24.)

Not satisfied with Mr. Page's understanding of the state of affairs, the respondent took the testimony of Mr. Smull, a member of the controlling committee, and what do we find?

Mr. Smull directly *confirms* this statement of Mr. Page. *He would not affirm* that the charter in the case at bar if presented to the committee *would or would not* have been approved. He confines himself to testifying regarding *general principles* upon which the Board was supposed

to act, or purposes which the Board was seeking to accomplish, and the means they used to accomplish those purposes. For instance:

> "We endeavored from the start to get all neutral boats on time charters to reputable American houses for round trips Pacific and round trips Atlantic."
> * * * * * * *
> "We did not favor the gross form of charter." (p. 191.)

But when asked directly, concerning the charter under consideration in the case at bar (p. 192-93.)

> "Q. * * * Was the practice of the controlling committee at that time such that in any reasonable trade this offer would have been approved, if accepted by the owner."

he answers:

> "I don't *think* it would, but I want to qualify that by the statement that *we never said as a committee what we would do until the charter was put before us.*
>
> "Q. But in accordance with the practice that had been in vogue to that time would this in normal course of procedure have been *likely* to have met with the approval of the committee?
>
> A. No: Our records show no approval of any Norwegian boat at that time."

This, it will be observed, is a mere opinion of the witness as to what is "likely" based on *no record of approval,* and not a direct evidence of what the Board would have done. Taken in connection with his previous answer that "I don't *think* it would," with its significant qualification, it is mere argumentation, and far from persuasive at that. We shall presently see that his records *do not* support the conclusion.

On cross-examination, however, he is asked (p. 219-220.)

"Q. When any individual charter was presented to the Board, say up to November 3rd or along into November, was the individual charter scrutinized and individual judgment given upon it?

A. Yes, sir.

Q. There was no fixed rule applying to all charters that came in, was there?

A. Yes, sir.

Q. In what respect?

A. The charters as they came in were all placed before the secretary of the Board, who tried to ease our labors as much as possible by pointing out by ringed pencil marks the ports, loading ports, destinations, rates, charterers' names and such as that, when the charters came from his desk into the room of the committee, and *each charter from the inception of the Committee until today has been read and looked over by each member of the Committee.* When we go in session we sit around the table and examine each charter party, and then the charter parties are put in a pile before the chairman, and *then they are taken one by one and acted upon.* In cases where we have not the charter party, the full conditions of charter expressed in telegrams are acted upon, or in cases where there are letters presented, the charter party made in error, we act on the letter.

Q. What was the necessity of all that detail Mr. Smull, if there was a fixed rule applying to all charters?

A. You can't make a fixed rule on all charters. Every charter that comes in differs a little bit.

Q. That is what I apprehended; and *then as a matter of fact you have to pass an individual judgment on each charter?*

A. *Yes, Sir.*

Q. *Dependent upon various details with respect to the charter whether it would or would not be approved by the Committee?*

A. *Yes, sir.*

Q. *And until you had the particular charter before you you could not say whether you would or would not approve it?*

A. *With the qualification that if a wire was sent with the full details.*

Q. *Unless you had the wire with full details you could not say whether you would or would not?*

A. *No, sir.*

Q. When was it that the Board finally decided that no neutrals could be chartered except to the Board?

A. I believe about *March 18, 1918.*

Q. *Before that time the neutrals could charter to merchants without interference on the part of the Board?*

A. Yes, subject to the charter party conditions made with our approval."

So, also, with reference to the testimony of Page Bros. that the Board did not interfere until about the 27th day of November, the witness is asked (p. 222):

"Q. There is some testimony here of ship brokers out there—and I refer to Page Brothers, you know them?

A. They are not ship brokers, they are freight brokers.

Q. They were not interfered with until the 27th of November, you would not undertake to say that they were not right?

A. We never had a communication from Page Bros. for approvals.

Q. Their testimony with reference to ships they got freight for—what I am trying to get at is, you would not undertake to say their testimony so far as that was concerned was not correct, you personally have no recollection that would gainsay it?

A. No."

We might stop here, so far as concerns the contention that the charter would not have been approved by the Committee, because it conclusively appears that even the

committee-man does not know whether it would, or would not, have been approved. Therefore, under the rules of law above referred to, the finding of the District Court is not justified. But let us go further. We have more conclusive evidence upon the subject than this.

THE COMMITTEE'S RECORDS SHOW NO DISAPPROVALS DURING THE TIME IN QUESTION.

It will be noticed that on the direct examination of this witness he is asked (p. 216.)

> "Q. Did you say you had examined your records before you came, to see whether you had approved any lump sum charters the end of October or early in November?
>
> A. Yes, I went through our list of *approvals* up to about the first of the year, and from the time I went in there were no approvals of steamers under foreign flag round trip charters.
>
> Q. Lump sum?
>
> A. Lump sum gross form. The only approval was several of these boats in the East we had to get this way and we allowed a lump gross charter to get them here."

It will be noticed that this testimony only applies to his approval sheet. Accordingly, on cross-examination he is asked (p. 224-225):

> "Q. You have told us about looking through the records and not having found any lump sum charters during that period that were approved?
>
> A. Of neutral boats.
>
> Q. Have you found any *that were denied,* any record of any that were denied?
>
> A. *I simply looked through the approval sheets I had there.*"

It then appears that counsel for libelant had previously made application for permission to have *access to the records* to find out *from the records* what the situation was, which application was refused, applicant being referred to Mr. Campbell, in Washington. The witness is asked (Smull, p. 226-227):

> "Q. Is there any reason why I could not have access to those records here and go over them personally? A. I don't know.
>
> Q. As a member of that Board I now make the request.
>
> A. I will ask Mr. Campbell. I will get him on the phone when I get back and I will ask him, and if he says yes I will be pleased to send them over to you."
>
> * * * * * * *
>
> "Q. I want access to the records of the Chartering Committee to ascertain what the records show with respect to the chartering of vessels during this period from November 3 to December 21?
>
> A. You mean as to approvals and disapprovals?
>
> Q. Yes, as it appertains to the facts we have been examining about in this case?
>
> A. I think that would show the whole thing, we have a sheet that shows approvals and disapprovals every day; the application either shows an approval or disapproval."

That hearing, which took place on September 30, 1918, was adjourned for the purpose of permitting Mr. Smull to see if he can permit Mr. Frank to examine his records, subject to further cross-examination. (pp. 229, 237.)

The hearing was not resumed until October 16th (p. 237), and the communications between the Board and Mr. Campbell and Mr. Burling were then produced.

Mr. Campbell, in his telegram, stated that he had no objection to the Board showing Mr. Frank the list of approvals and disapprovals between November 3rd and *December 31st,* but that he *was not in position* to definitely *advise* whether they should let Mr. Frank *examine them generally.* Upon this question the Committee should exercise its own discretion, for reasons set forth in the telegram—concluding, however, that the Board should give him full information and exhibit to him all documents bearing on the "Bayard"-"Beaver" controversy. (p. 238.)

It appears, however, that the Chartering Committee, after holding a meeting, *refused* to give Mr. Frank that privilege, and this appears to have been approved by Mr. Burling.

It appears that Mr. Smull did not vote or participate in the meeting, but a wire was sent to the Shipping Board that the Chartering Committtee had decided that

> "the full records showing all approvals and disapprovals made on all business *from the first of the year* could *not* be shown to Mr. Frank." (p. 246.)

Accordingly, *even the sheet of approvals and disapprovals* was withheld from inspection.

On this second hearing, however, Mr. Smull testified that he had made examination, and is asked (pp. 239-240):

> "Q. Since then I understand you have also made examination and found no cases of *disapproval* of any such charters?
>
> A. Yes, sir, between, as you requested, the dates of November 3rd and December 21st.
>
> * * * * * * *

> Q. Is there any record of any lump sum charters *during the entire time mentioned,* either of approval or disapproval?
> A. Not for round trip, no."

We had to be content with this statement of Mr. Smull that during the limited period, November 3rd to January 1st, the sheet showed *neither approval nor disapproval.* The fact that there were no *dis*approvals during this time is sufficient for our defense, inasmuch as that fact fails to support the contention of the respondents that the Chartering Committee *would not* have approved such a charter if presented. Nevertheless, it is far from complying with Mr. Griffith's suggestion (and in which we consider that he was sincere, that

> "All I want to do is to *get at the truth* about this demurrage",

coupled with his statement that he

> "is informed Mr. Smull will testify that the Committee and the Shipping Board *would not have approved* a lump sum charter any time between November 3rd and December 21st, 1917, *and before and after.*" pp. 124-125.

In view of this information, Mr. Griffith states that he is "somewhat puzzled by the testimony" of Mr. Page (p. 32), but we think he will now conclude that Mr. Page was right, because

COMMITTEE APPROVED THE SAME KIND OF CHARTER AS HERE PROPOSED, AS LATE AS MARCH 22, 1918.

The true significance of this limitation in the dates, and refusal to permit an inspection of the approval and

disapproval sheets, was not apparent to libelant's counsel at the time of the examination of the witness, and did not become apparent until, after his return to San Francisco, the charter of the Danish steamer *"Transvaal"* accidentally came to his notice. This is a charter dated *March 22, 1918* of a Danish vessel for a voyage from San Francisco to the Orient—China, Japan, Manila within certain limitations—and return either San Francisco or Seattle, for a lump sum of $500,000, upon precisely the same form of charter party as was proposed in this case, and which was approved by the United States Shipping Board and the Inter-Allied Chartering Executive of London, and this, too, notwithstanding the testimony of Mr. Smull that about March 18, 1918, it was finally decided by the Board that no neutrals could be chartered to merchants, but must be chartered to the Shipping Board. (Record, pp. 252, 327.)

Under these conditions, it is fair to assume, that, after the first of the year, and subsequent thereto, there were other charters of this character approved by said Board.

It thus appears that there was *no rule* respecting that matter that would justify the conclusion that this charter *would not* have been approved *even so late as March 22, 1918.* Certainly if the Chartering Committee approves a charter of exactly the same character at that late date, it may reasonably be assumed that they would have approved the present charter. At any rate, no fair inference can be drawn that they would not have approved it.

How, in the face of this evidence, can the court be justified in finding that the Shipping Board would *not* have approved this charter?

This ought to be conclusive.

But in addition to this, we have a large number of telegrams in the record between the Shipping Board and different parties proposing to charter certain vessels during the month of *December,* 1917, and among these vessels we find the "Bayard."

These telegrams confirm the conclusion that the Shipping Board would *not have interfered,* and in fact did actually authorize *a berthing* of the vessel.

TELEGRAMS RE "BAYARD" AND "BRAZIL."

The first one is dated December 5, 1917 (p. 195), *from* the *American Asiatic Company, Inc.,* mentioning offers *that Company* made for the "Arabian" and the "Bayard."

The offer for the "Arabian" was.....$170,000.00 lump sum one way, Seattle to Japan, January sailing.

The offer for the "Bayard" was.....$270,000.00 one Pacific round San Francisco to Japan and return San Francisco * * * stating also that the applicant must have two steamers to clear their congested freight, and are advised that the *owners* of these vessels will *not charter on government form time basis,* but *will place the same on berth themselves* for other ports if the Committee cannot approve the bids, and asking

the help of the Committee to arrive at some agreement with the owners in order that *they* will not lose the steamers.

Note that this was *not* a communication authorized *by the owners* of the "Bayard," but the communication of a *third party* seeking, through the Shipping Board *to get* the vessel.

We are, therefore, not bound by its statements, and entered our objection at the time (p. 195). But we fear the District Court was misled by the statements. Nevertheless, the correspondence shows the attitude of the Government, for it replied (p. 196) that they could not approve

the "Arabian" for $170,000.00
but *will approve* $130,000.00

The Committee also stated that a Japanese steamer *had been fixed the day before on that basis.*

This was an *approval for a lump sum charter* on the "Arabian," *a Danish vessel, outward bound, on December 5, 1917,* and on the *Japanese steamer* on *December 4, 1917,* and shows that Mr. Smull's testimony that the Committee during that period had only approved lump sum charters *inward,* is *erroneous,* as is *also* his testimony that the "Arabian" was loaded in the East and not at an American port. (p. 247).

At the same time the Shipping Board does *not refuse* the "Bayard" request, *but asks for information* concerning her dead weight carrying capacity (p. 196). This proves that there was no fixed rule

against such a charter, but, on the contrary, is a tacit admission that it was a subject for consideration.

They receive a reply, giving the dead weight 5300—cargo bale capacity 303,149 cubic feet.

To this the Committee replied on December 6, that they could not fix the vessel *at present,* but give no reason.

The next day, December 7, McNears, *referring to a message* from the Chartering Committee, telegraphs that *they* (McNears) were *offering for* the "Brazil" and "Bayard" 45 shillings on time charter, to which the Committee replied that they would approve, *but must have priority on homeward business.*

What is the significance of this correspondence? What was the message (which does not appear in the record) referred to by McNear, *as having been received from the Chartering Committee* the next day after the Committee had advised Asiatic that they could not fix the "Bayard" *at present?*

This charter, however, appears *not* to have been accepted by *the owner,* for on December 15, McNear again telegraphs with reference to the "Bayard" concerning wool which the Textile Alliance wished to ship from New Zealand to San Francisco, and requests the Board to give its approval for this instead of vessel returning by New Caledonia, which the Board said it would approve.

This, however, seems again *not* to have been agreeable *to the owners,* for on December 18, McNear, who

seems *desirous of obtaining control of the use of the vessel,* telegraphs that the agent of the *owner had fixed* full cargo bagged wheat and flour from Australian ports, adding that they (McNear) appreciated the owner's desire to control return cargoes, but *suggest* that the *Shipping Board should exercise its control* designating cargo that seems most urgent for the Government's requirements. (Ex. J. p. 202-203).

This is evidently an attempt to get the Government, *to interfere in favor of McNear,* as shown by the argument that follows in the telegram.

McNear, at the same time expresses his anxiety to see the vessels moving, and says he would appreciate it very much if the Board would do something to help the situation out.

This does not seem to have gone through, so on December 21 McNear asks for authority from the Board to *cable the owners* that the Board has approved *berthing* the vessel, but maintain the privilege of maintaining priority of return cargo, asking if they might send that cable at once and proceed *booking* cargo *outward;* to which the Board replied that they *would* permit the outward cargo to be "booked subject to Carey's confirmation." "In other words cargo space will be divided among the several interests at your loading port and not given to any one party." (Ex. K. & L. pp. 204-205.)

On the 22nd of December, McNear wires the Board assuring them that all regular shippers would be given equal opportunity and equal rates on outward

cargo, with right of priority to the Government on return cargoes, and that they *have owner's authority for these voyages* (p. 207).

And on the 24th they wired the Committee that the *owners had signed the charter* awaiting the Committee's approval. (Ex. O. p. 207).

The Board was willing to accept this arrangement, but apparently received no word of approval from London (Telegram December 24, Ex. P. p. 208).

The witness then refers to other telegrams along the same line on getting Interallied approval, *which was finally granted* (p. 209).

This correspondence is conclusive to the effect that not only was the Chartering Committee not refusing lump sum charters, but particularly indicates that they were also not refusing liberty to place the vessel UPON BERTH *for owner's account,* the only limitation in that case being that the Government should have preference on the return voyage with regard to the nature of the cargo to be carried, nothing said as to rates.

The rest of the correspondence has reference to the "Brazil" which has no direct application to the present controversy, except in so far as it might show how the Board was handling the business at that time, and whether or no they were insisting upon time charters.

On December 6, they received a telegram from Grace & Co., who desired to obtain control of that vessel,

saying they had offered 45s. but the owners preferred waiting before chartering at that rate.

Nothing came of these inquiries.

It seems some misunderstanding on the part of the owners arose concerning the matter, and *McNear suggests* to Shipping Board that the owners be cabled recommending offer of time charter, *and telling them the Board disapproved berthing owner's account* (Ex. T. p. 214).

This resulted in *McNears getting the vessel for their account* on a time charter and placing her *in berth* for the voyage *which the Shipping Board and the Interallied had already indicated their willingness to permit for owner's account,* and on January 4, McNear cables that they are glad the efforts of the Board have been successful and that they *(McNear)* chartered the vessel *from the owners* on time charter terms as authorized by the Board and on our booking the cargo.

On January 7, the Controlling Committee advised McNear to take their approvals from Cook Shipping Board (meaning thereby the local San Francisco department.) (pp. 215-216.)

This correspondence is very illuminating with regard to the manner in which merchants and the Board dealt with each other in such matters. It, together with the granting of the charter of the "Transvaal" above referred to (approved March 22, 1918) proves absolutely that there was no rule controlling the approval of charters, but, as Mr. Page testified, it all "depended upon the discretion of the Chartering Board." (p. 24).

It proves further that there is no foundation for the claim that, because of any alleged policy of the Board, there can be any presumption that the Board would have denied approval, since, not only had they, during the period in controversy, approved lump sum charters for one way trips *both* to and from Asia to American Pacific Coast ports, but *they had also, as late as March 22, 1918,* approved a lump sum charter for a *greater amount* on a Danish vessel ("Transvaal") for a *round* trip from an American port, under precisely the same form of charter proposed by Mr. Moore.

ATTITUDE OF THE BOARD IN THIS CASE.

Not only are the facts above adverted to illuminating regarding the attitude of the Board, but so, also, is the manner in which they deal with the testimony in this case.

We have already seen that they refused access to their records, without giving any sufficient reason for such refusal. The only suggestion of a reason for such refusal is found in Mr. Campbell's telegram of October 1, (p. 238), namely,

> "If he (Mr. Frank) represents parties having or intending to present claims against United States or if your files contain information which should not be given publicity your Committee should exercise its own discretion as to permitting him to make general search of files,"

nevertheless, in the same telegram they are told that there is no objection to their showing list of approved

and disapproved charters between November 3 and December 31.

However, they did not see fit even to permit inspection of that part of the record concerning which Mr. Campbell said there was no objection. They just flatfootedly refused permission to see anything at all, except the papers that they themselves produced at the hearing, and they never attempted to find out whether or no Mr. Frank had any other cases such as indicated by Mr. Campbell.

That they were, however, sympathetic with the respondent's endeavor to hold down the amount of the recovery, is admitted by Mr. Smull.

So early as June 3, 1918, the entire case of the respondent was laid before them in a letter addressed to them by Mr. Campbell.

While it will be noted that respondents have been unable to prove any of the contentions set forth in said letter, the following statement in said letter, which is expressly adopted by Mr. Smull as indicating his attitude toward the case, is significant, namely (p. 242):

> "It is of interest to the law division of the Shipping Board that such information be given the court, *because we desire to avoid the precedent* of any judgments in the United States courts *fixing heavy demurrage damages* in collision cases. *The Board is soon to be confronted with voluminous litigation* in collision cases, and *it is to its interest to have the demurrage rates kept down.*"

This Mr. Smull expressly admits also to be his attitude in the above matter (p. 244).

We are satisfied from the foregoing, that *there can be no reasonable inference* that the vessel *would not* have been permitted to sail either under a *lump sum charter* or *on berth for owner's account,* had application been made *in November.* Even if the matter be considered to have been left in doubt by the evidence under the rule so frequently referred to, "Strict justice requires that the party in fault should bear whatever inconvenience or hardships there may be arising out of the attendant difficulties and doubts."

Hence, *so far as interference by the Shipping Board is concerned, the finding should be for libelant.* There is no evidence sufficient to sustain the contrary finding upon which the judgment is based.

THE "BRAZIL."

If the finding that the Shipping Board would not have approved the Moore—"Bayard" charter be error, which we think it is, then the question of *the idleness of the "Brazil" becomes immaterial,* because that has only to do with the question as to *whether or no* the owners of the "Bayard" *would have accepted a charter which it is admitted the Shipping Board would have approved,* namely, a charter at the rate of forty-five shillings per dead weight ton per month. In the language of the District court,

> "If it were not for the voluntary idleness of the 'Brazil,' I would allow demurrage to the 'Bayard' at the rate of forty-five shillings per dead weight ton per month for the period of thir-

> ty-four days. But as the owners preferred to leave the 'Brazil' idle when she could have been chartered at those rates, it is reasonable to conclude that they would not have accepted them for the 'Bayard' had she been in commission." (p. 305).

If, therefore, it be found that she *could have been chartered* to Mr. Moore *for the lump sum of $400,000* for the round trip, *there would be no occasion to consider whether or no the "Bayard" would have accepted* the rate of forty-five shillings per deadweight ton per month, that being merely an alternative proposition.

However, even with respect to the alternative proposition, no proper deductions can be made from the case of the "Brazil" and applied to the case of the "Bayard."

In the first place, it is to be noted that the "Brazil" did not arrive in the harbor until *ten days after* the collision, at which time all the conditions affecting the "Bayard" had changed.

Mr. Moore testifies:

> "Q. Did you have any negotiations with them just prior to November 3 with respect to the chartering of the motorship 'Bayard'?
>
> A. I had chartered her for two trips previous to that, and I was trying to get her for a third trip and had negotiated quite a bit with the owners." (p. 18).

Again, speaking of these negotiations, Mr. Kutter says:

> "A. They were handled through our office.

Q. Now, what was done with respect to them?
A. We cabled to our head office at Christiania, asking them to give us *a free hand* with the chartering of the boat.
Q. Before you received the reply, what happened?
A. The collision occurred.
Q. What did that do?
A. That stopped all negotiations'' (p. 109).

Moreover, there is no evidence of what was attempted with respect to the chartering of the ''Brazil'' except such as appears from the telegrams hereinbefore referred to between McNear and the Shipping Board, *which did not begin until December 7 (p. 198), more than a month after the collision,* and only 14 days before the completion of the repairs on the ''Bayard.''

It is impossible to say what would have been done with the ''Bayard'' had she been able to contract during that month preceding the negotiations with regard to the ''Brazil.'' Under the rapidly changing conditions at that period of the war, no safe conclusion could be arrived at upon the subject based on the fact that at a later period the ''Brazil'' was allowed to lie idle.

Moreover, as already indicated, we are not bound by anything McNear was doing, nor by any statement made by him, or other third parties, regarding what the owners would do, in view of the fact that those statements are not only hearsay, but also were made in an attempt to *secure control of these vessels for themselves.*

Under these conditions, anything done with respect to the "Brazil" is entirely inapplicable to the situation of the "Bayard" on November 3, the date of the collision.

As already indicated, by reason of the collision, and from that date until December 27, the "Bayard" was undergoing repairs, and could not have entered into a contract of charter-party (p. 120).

Under the rules of law hereinbefore referred to, the deduction made by the court from the fact that the "Brazil" remained idle, is not warranted by the evidence. It is based upon a *presumption against the libelant,* and in favor of the respondent, with nothing to connect it with the "Bayard" save the fact that the two vessels had the same managing owner. And this, in the face of the fact that, *under the law, the presumption is against the respondent.*

It is further to be borne in mind, that the two vessels were not owned by the same owners, though they were in the hands of the same agents, or managing owners.

The owner of the "Bayard" is the Aktieselskapet Bonheur, a corporation organized under the laws of the Kingdom of Norway.

The owner of the "Brazil" is A. S. Gangerroff, a different corporation (p. 108).

It does not necessarily follow that because the managing owners are the same, that the two vessels would be handled in the same manner. The managing owners

are mere agents of the owners, and subject to their control.

We have already seen that, previous to the collision and up to the time the negotiations were broken off, there was no interference by the Shipping Board with such a charter as was proposed by Mr. Moore. In fact we have shown, and it is undisputed, that *precisely such a charter-party was approved by the Board as late as March 22, 1918.*

What was subsequently done in the way of charter, should not affect our right of recovery, because our rights are to be *measured by the conditions existing at the time of the accident.* As already said, *it was then the respondent's liability became fixed.* Any changes in conditions subsequent to that time, by reason of which the market became no longer available, are mere elements in the loss of the market *consequent upon the collision.*

A subsequent fall in the market, or, what is tantamount thereto, a subsequent refusal of the Shipping Board to approve a charter for the price named, cannot avail the respondent, providing that at *that date* such approval "*could* * * * or *might* have (been) obtained." *Williamson v. Barrett,* ante.

Had we in fact made the charter with Moore, and been detained so that we had lost that charter, we would have been entitled to recover, *in addition* to the amount lost during the period of repair, the amount lost during the balance of the term of the charter,

namely, the difference between the original and the substituted charter. It was so held in

The Belgenland, 36 Fed. *505-506.*

THERE THE VESSEL WAS ON A VOYAGE TO A PORT OF DISCHARGE, AND WAS UNDER CHARTER. AFTER DISCHARGE SHE HAD A CHARTER TO PROCEED TO ANOTHER PORT AND LOAD BY A GIVEN DATE.

The detention for repairs made her unable to reach that port on the given date, and, as freights had fallen, the charterers cancelled the charter, as they had a right to do.

The steamer therefore went to a neighboring port for a similar cargo, and took the best freight she could get.

She was allowed to recover for the *difference between the two charters.* The time occupied in repairs, covering almost the entire time—35 of the 38 days which would have required her to perform the original charter, she was allowed this difference during the extra three days.

> "If the existing charter is lost in consequence of the collision, and a charter at lower rates is necessarily taken for the residue of the charter period, the owner is entitled to compensation for this loss up to the expiration of the term of the original charter. He is entitled to this allowance, because he would not otherwise be indemnified for his actual loss, and because there is no legal rule which precludes the recovery of his actual loss in such a case. The loss of the larger rate is the immediate consequence of the collision, and, the rate being fixed by the existing contract, this item of damage is not subject to the objection of being

> in the least uncertain, hypothetical, or speculative. The ship-owner is as plainly entitled to recover for such a loss as the cargo owner for the loss of the market through the delay of the ship by negligence, or through collision. See *The Guilio,* 34 Fed. 911, and cases there cited; the *J. Nixon,* 2 Fed. R. 259. Compensation for difference in charter rates was allowed the ship-owner in the case of *The Star of India,* 1 Prob. Div. 466, and *The Consett,* 5 Prob. Div. 229, which are quite like the present. No adjudications are cited to the contrary. See *The Lake,* 2 Wall, Jr. 52. The libelant is therefore entitled to compensation for the value of the use of the vessel during the 35 days' detention, computed upon the basis of her original charter rates, and *also* to the *difference in her earnings for the three following days.''*

We can see, therefore, no application of the fact that we subsequently chartered for 45 shillings on time charter, unless it be to *increase* our recovery *by the* allowance to us of the *difference between 45s. on time charter and* $400,000 *on round trip charter* for the BALANCE OF THE TIME WE WOULD HAVE BEEN ON THE VOYAGE OVER AND ABOVE THE 48 DAYS OCCUPIED IN REPAIRS, VIZ.: 37 days—a very considerable sum, which we consider ourselves equitably entitled to, because we deem we *did* lose the Moore charter through the collision.

DEDUCTION OF TEN DAYS BECAUSE OF TIME NECESSARY TO COMMUNICATE WITH THE OWNERS.

The District Court makes the suggestion that

> ''The period covered by the making of the repairs was forty-eight days. It would, however,

in any event, have taken at least two weeks to have arranged for the acceptance by the owners of a charter satisfactory to the Shipping Board'' (p. 304).

For this reason the court fixes the time of demurrage at thirty-four days (p. 305).

This is not justified by the evidence.

It is true that Mr. Kutter testified that on account of cable interruptions it took all the way from one week to two weeks before they had a reply from Norway. But with respect to the negotiations with Moore he testifies.

> ''Q. Did you handle at your end these negotiations?
> A. They were handled through our office.
> Q. Now, what was done with respect to them?
> A. We cabled our head office at Christiania asking them to give us *a free hand* with the chartering of the boat.
> Q. Before you received the reply, what happened?
> A. The collision occurred.
> Q. What did that do?
> A. That stopped all negotiations (p. 109).

From this it appears that the local agency had already applied for a ''free hand'' in making the charter. How long that was done before the collision, does not appear, but having already been done, it is certain under the testimony that they could expect an answer in less than ten days, and if the answer had been favorable, giving them a free hand, no further cabling would have been necessary, because then the

negotiations would have been by direct conference between the parties at the port of San Francisco.

We think, therefore, we have disposed of the suggestions of the defense by which they hope to deprive us of the market value of the use of the vessel during the period of repair, and we have only to figure the amount.

We shall place before the court the figures showing the different methods under which that amount can be arrived at.

III.

Amount of Demurrage.

There can be no doubt concerning the *market* value of this at that time.

The offer of $400,000.00 fixes the market value. There is absolutely no evidence in the record to controvert it as being market value at that time.

The following is our way of figuring:

The expense of running the ship on the proposed round voyage, would be:

General expenses (Libelant's Ex. No. 2, Rec. p. 325)	$21,920.70
Crew stores, etc., including "fuel", $260 per day (Rec. pp. 43-44). From this must be deducted the "fuel", which appears also in Ex. 2 above, as $2344.46 for the round trip. This amount divided by 85 days, the length of the trip = $27.57 per day. 260—27.57 = 232.43 × 85 =	19,756.55
Or total of expense	$41,677.25

Our figures then would be:

Gross market value for the vessel on the proposed voyage	$400,000.00
Expense of earning the charter hire	41,677.25
Leaving a net earning of	$358,322.75

Time required to make the voyage "about 80 or 85 days—between 80 and 90 days". (Rec. p. 43.)

Taking the mean between the two—85 days, we have 358,322.75—85=4215.56 per day.

She was detained Nov. 3 to Dec. 21—48 days, making a total demurrage of	$202,346.88
To this should be added the amount of the material damage	64,157.94
Making a total of	$266,504.82

for which amount we claim judgment, with interest.

That the above market value of.....$400,000.00 is not excessive, is shown by the amounts paid for vessels under a *one way* charter, viz: $345,000 (p. 27), $400,000 (p. 28), $500,000 (p. 28)—depending on the size of the vessel.

A round trip would be considerably more.

In this connection, it must also be borne in mind that Mr. Moore was bidding on the large measurement capacity of our ship. "I know her cubic; that is what I was interested in" (p. 20). That was 7500 tons (p. 108).

PLACING VESSEL IN BERTH FOR MEASUREMENT CARGO.

Had the vessel been placed in berth, without charter, taking measurement cargo, on which basis Mr. Moore intended to place her in berth (p. 20), we have:

Measurement capacity 7500 tons (p. 108).
Outward rates allowed by Shipping Board $20 (Page & Smull).....$150,000.00
Inward rates allowed by Board $50..... 375,000.00

Total $525,000.00
Cost of operation..... 41,677.25

$483,322.75

which on an 85 day voyage, 5686.15 per day, or for 48 days' demurrage.....$272,935.20
to which should be added the material damage 64,157.78

Making a total damage of.....$337,092.98

PUTTING HER IN BERTH FOR DEADWEIGHT CARGO.

Mr. Smull said her deadweight capacity was 4200 tons.

Mr. Smull was only approximating, or guessing, and that, too, by assuming that she was a coal burner. This vessel was an oil burner, which increased her deadweight capacity.

She had carried mixed cargoes of 4860 tons of copra, sugar and cocoanut oil (Rec. p. 114).

Copra was offering as high as.....$80 per ton
Sugar 40
Cocoanut Oil.....$45 to 50 per ton

She had carried outward, 131,000 cases of Oil, market rate to 85 to 90 cts. a case. (Rec. p. 113.)

131,000 cases Oil—allowing the lowest figure, .85 =		$111,350.00
Inward		
3047 tons Copra at $80=	244,160	
1610 " Sugar at 40 =	64,400	
203 tons Cocoanut Oil at 45 =	9,135	317,695.00
		$428,945.00
Cost of operation		41,677.25
		$387,267.75
Which on 85 day voyage = 4556.09 per day, and for 48 days makes demurrage		$218,692.32
Adding material damage		64,157.94
Makes total		$282,850.26

So, it will be seen, we have adopted the most conservative method of figuring our demurrage consistent with justice, viz.. $202,346.88

As against what might quite fairly be claimed either $272,935.20
or 218,692.32

Not to speak of the difference between our charter rate for a round voyage of.. 400,000.00 compared with what other vessels were getting on the *homeward* voyage *alone*..

{345.000.00
{400,000.00
{500,000.00

There can be no question fairly made as to our claim of the market value of the use of that vessel during the period of detention, and under the law it is the market value that determines our recovery.

Mr. Smull computes the value of the use of the vessel per day on the basis of forty-five shillings per ton deadweight on time charter to be..$1888.00 per day (p. 237).

INTEREST IN COLLISION CASES.

In re Great Lakes Dredge & Dock Co., 250 Fed. 916:

"In collision cases, the allowance of interest on the award rests in the discretion of the court; but, where there are no special circumstances affecting the matter, the general rule should be applied.

In collision cases, the general rule is that interest on the damages eventually awarded should be computed from the date of the collision, or from the dates when payments for the necessary repairs were actually made.

In collision cases, interest on demurrage should be computed from the time the vessel returned to service."

The El Monte, 252 Fed. 59 (5th Cir., June, 1918):

"As the party responsible for damages resulting from a collision became liable when it occurred, interest on the amount of such damages, if not then paid, was allowable from that date."

$6023.75 EXPENDED FOR WATCHMAN AND CREW.

There was a stipulation entered into between the parties with respect to certain items of damage (Rec. pp. 307-310).

This stipulation agreed that the physical damages amount to..... $58,096.15

in addition to which, the libelants still claim..... 6,023.75

for wages and keep of crew, etc., which sum was disallowed.

The items of this expense are set forth on page 309 of the Record.

We fail to understand upon what theory this was disallowed, and we respectfully insist that, to whatever decree this court shall determine the said libelant is entitled, the sum above mentioned be added.

CONCLUSION.

In conclusion, we respectfully contend that, inasmuch as the respondent admits liability for the collision, there can be no possible doubt that the respondent was in fault. Being in fault, every presumption is against the respondent, and the evidence that the Shipping Board would not have approved the Moore charter is not sufficient to overcome that presumption. On the contrary, the evidence indicates not only that the Shipping Board *did* allow a charter-party for a lump sum of $500,000 under exactly the same terms, but it further had indicated its willingness to allow the vessel to go in berth for owner's account. So far as there is any evidence on the subject worthy of the name, that evidence is in favor of the libelant, and judgment in this case should go for the libelant for the amount of demurrage claimed, either upon the basis of the Moore charter, or upon the basis of

placing the vessel in berth, as indicated by the calculations presented to the court on page 46 hereof, together with interest.

Dated, San Francisco,
October 11, 1922.

Respectfully submitted,

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Appellant.